

Samuel Mitchell testified that he did not have any problems or injuries to his left knee before January 17, 2007. Mitchell was stepping off a skid when he twisted his left

knee. He reported the injury on January 17, 2007, to his supervisor and then went to the dispensary. A claim report¹ and an incident report² were completed. Mitchell testified that it was necessary to complete the reports in order to receive medical treatment.

Mitchell was referred to St. Francis' emergency room for treatment. X-rays were taken which revealed a soft tissue swelling over the anterior tibial tubercle. Mitchell was instructed to take Ibuprofen for pain and also to ice the knee. On January 25, 2007, Mitchell saw Dr. Myron Zeller at respondent's dispensary and then weekly follow-up appointments were scheduled. Dr. Zeller had recommended that Mitchell be seen by an orthopedic surgeon in January, February and March 2007 but respondent never approved it. Mitchell continued to work doing light duty for approximately two months and then he was released to full-duty work. Respondent denied his claim and refused to provide further treatment for his knee.

Mitchell continued to have problems with his knee so he sought treatment on July 16, 2007, with his personal physician, Dr. Mark A. Thomas. On July 16, 2007, the x-ray revealed the tibial tubercle is a bit prominent but otherwise normal. Mitchell stated that his knee continued to intermittently swell and become stiff dependent on his activities.

On July 17, 2008, Mitchell fell while playing racquetball and broke his left wrist. He sought treatment at Stormont Vail's emergency room. On July 21, 2008, an open reduction and internal fixation was performed on Mitchell's wrist by Dr. Bradley T. Poole. Mitchell testified that he did not re-injure his left knee but that he continued to have the same problems since the accident on January 17, 2007.

On January 5, 2009, Mitchell returned to Dr. Thomas due to complaints of swelling and stiffness in his left knee. The doctor diagnosed him with chronic intermittent left knee pain. Dr. Thomas ordered an MRI which was performed on January 6, 2009. The MRI revealed small osteochondral lesions seen involving the anterior aspect of the bilateral femoral condyle centrally with minimal subchondral edema, posterior horn medial meniscal tear and small Baker's cyst. The doctor referred Mitchell to Dr. Poole for evaluation on April 6, 2009. Mitchell again requested treatment from respondent but his request was denied.

On April 22, 2009, Dr. Poole performed a left knee arthroscopy with partial medial meniscectomy. The doctor diagnosed a medial meniscus tear and took Mitchell off work. At the request of his attorney, Mitchell was examined by Dr. Lynn Curtis on April 24, 2009. Dr. Curtis opined that Mitchell's left knee injury was in all medical probability the result of his January 17, 2007 accidental injury with aggravation at work thereafter.

¹ P.H. Trans., Cl. Ex. 5.

² *Id.*, Cl. Ex. 4.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

Respondent argues Mitchell was released from treatment and then went an extended period of time without complaining of knee problems as he treated with his personal physician. And he then engaged in strenuous physical activity which further demonstrated his knee injury had resolved.

Mitchell testified that his knee consistently caused him problems after the January 17, 2007 accidental injury. He simply did not receive treatment, an orthopedic consult, recommended by the plant physician because respondent denied his claim. He then went to his personal physician but x-rays did not reveal the problem and he was not provided treatment. But Mitchell testified his knee continued to intermittently swell and stiffen with activities. When he attempted to play racquetball, which he had not done for years, on the first serve he fell and broke his wrist. Mitchell testified that he did not injure his knee in the fall. As he continued working his left knee continued to cause him pain until he again returned to his personal physician. Finally, an MRI revealed the problem and surgery was performed. And Dr. Curtis attributed the condition of Mitchell’s left knee to the injury on January 17, 2007. This Board Member finds Mitchell has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on January 17, 2007.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 30, 2009, is affirmed.

IT IS SO ORDERED.

³ K.S.A. 2007 Supp. 44-501(a).

⁴ K.S.A. 2007 Supp. 44-508(g).

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2008 Supp. 44-555c(k).

Dated this _____ day of July 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge